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No. _____

In the

# Supreme Court of the United States

October Term, 1995

ROGER TILBURY, et al.,

*Petitioners,*

v.

MULTNOMAH COUNTY; OREGON, et al,

*Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

## APPENDIX

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December 26, 1995

54 pp

## INDEX TO APPENDIX


1. Oregon Supreme Court Opinion ..... 2

2. Oregon Tax Court Opinion ..... 11

3. United States Constitution ..... 21

4. Oregon Constitution ..... 22

5. Statutes
   - ORS 174.040 ..... 28
   - ORS 305.380 ..... 29
   - ORS 305.583 ..... 29
   - ORS 305.587 ..... 32
   - ORS 311.205 ..... 35
   - ORS 311.806 ..... 36

6. Abstract of Record
   - Taxpayer Petition ..... 38
   - Answer ..... 46
   - Motion for Summary Judgment ..... 50
   - Motion for Summary Judgment ..... 51
   - Motion for Summary Judgment ..... 52

## APPENDIX

IN THE SUPREME COURT OF THE
STATE OF OREGON
Roger TILBURY;
Margaret M. Tilbury; James Marquard;
Elizabeth Marquard; Linda K. Richardson;
Alan E. Kinsel, Jr.; John Ferguson; Sarah Ferguson;
John Bulkley; Honor Bulkley; Jason Cho; Carlyle MacHarg III;
Dale Denson, dba Dalton Realty;
Jeffrey A. Reingold; Francine G. Reingold;
Greg Fowler/Martin Shore, dba Fowler/Shore Acquisitions;
J. G. Jones Co.; Fran Matson;
Ruth W. Norris; Fred W. Norris;
Eileen Dahlheim; Martin G. Zell;
Richard A. Leffler; Amy Richardson-Leffler;
Sylvia May Kissinger; Barbara Jean Kissinger;
Arnold Rochlin; Kaye Rochlin;
Janice Sakofsky; Renda K. Horn,
trustee for Clyde V. and E. Margaret
Brummell Trust; Mae G. Strong;
Mark S. Pelay, PR Estate of Anthony
Pelay, Jr.; Hendrika S. Fincher;
Jack D. Dixon; Carol J. Dixon;
Florence E. Fritzler; Harold W.
Fritzler; James J. Mclaughlin;
Robert D. Randall; the Robert
Randall Co.; Clifford C. Stephens;
Rhonda M. Stephens; Kenneth Allen
Pereira; B & B Metal, Inc.;
Robert D. Banford; Betty R. Banford;
Ronald L. Williams; Phyllis M. Williams;
Vern R. Williams; Robert Lincoln;
Janet L. Benson; Thomas M. Ullmann;
Kathryn A. Blanchard; Donald E. Pollock,
dba Don Pollock Investments;
Julia G. Pollock; Jeffrey P. Fish;
Lynn E. Fish; Robert A. Scanlon;
Richard I. Kessler; Holly S. Kessler;
Roger E. Kurilo; Jerry L. Ward;
Nancy A. Ward; Ronald R. Myers;

Darlene K. Myers; Joan R. Salvatore;
Dennis G. Ogan; Kathryn H. Ogan;
Richard D. Lutz; Dorothy M. Lutz;
Albert H. Gruen; Maxine P. Gruen;
Charles G. Coulter; Edna M. Coulter;
Thomas P. Moyer; dba Tom Moyer Theatres
and TMT Development Co., Inc.;
Harding G. Carlson; Anita L. Carlson;
Cliff Stephens; Richard L. Carpenter;
Don Baker; Levern J. Stevens;
Ruth E. Mcnamee; Bobby D. Mcnamee;
Mary Mott; Brad P. Every;
Rachel M. Seal; Fred E. Hungate;
Doris W. Evatt; David D. Rand;
Arlene J. Rand; Velma Henderson;
Dean Becker; Joyce E. Becker;
Joseph E. Weston, dba Weston
Investment Co.; John W. Russell,
dba Russell Acquisition Co., Inc.;
Two Hundred Market Assoc.;
Elmer L. Reho; Edith M. Reho;
William L. Self; Margaret M. Self;
John W. Stenkamp; Carroll J. Stenkamp;
Richard A. Pedersen; Patricia R.
Pedersen; Hugh W. Milleson;
Susan Robertson; Ray K. O'Dell;
Shirley J. O'Dell; A. E. Brim;
William C. Reed, dba R & R Homes, Inc.;
Oregon Worsted Company; Eben Hill;
Mabel Hill; James C. Butler;
Addie K. Benson; Sivers Development
Group, dba Sivers Construction Co.,
a Washington corporation; Sivers
Investment Partnership, a limited
partnership; Propco, Inc.,
an Oregon corporation; T & W
Equipment Co., an Oregon corporation;
Airport Way Associates, a limited
partnership; Sivers Real Property

Partnership, a limited partnership;
Elizabeth Sivers; Guardian Management
Corporation, agent in fact and assignee;
James P. Kramer; Mamie C. Kramer;
Melvin Barcus, Chris W. Chilberg;
Linda S. Chilberg; Stuart Cox and
Richard Gerstl, dba Pyramid Properties;
Richard H. Fabrycki; Janice E. Fabrycki;
Hhugh Ewart; Rogers Construction, Inc.;
Oregon Asphaltic Paving Co.; C. K.
Hammond, TR; Jean R. Hammond, TR;
Terry L. Holden; Leo G. Graham;
Arthur A. Riedel; Kenneth J. Pipps to J & J Properties, Inc.;
Marquam Village Investors;
Steve Johnson; Jane D. Keating-Jones;
Dale G. King; Maxine J. King;
WPL Associates; Henry G. Laun;
Yvonne L. Laun, Leavitt Shay Real Estate
Services, managing agent for
Flanders Street Partners & Uptown
Heights Associates; James A. Montgomery;
Esther A. Montgomery; Alvin D. Nadeau;
Peter A. Nathan, M.D.; Helle Nathan;
Bertil Olson; Beverly Olson;
Charles H. Randolph; Leila F. Randolph;
Robert F. Rinker; Aubrey P. Schmidt;
general partner in Twenty-Second & Davis
Oregon, Ltd. and The Flanders Partnership;
Geraldine M. Zancolli; Upshur Courts, Inc.;
Steve Rose; Bristol Equities, Inc.;
Richard O. Hartmann; Kris Preslan;
Bruce Preslan; Spar Investment Co.;
Galt Associates; La Hacienda Associates;
Brim, Inc.; Brim Capital Corporation;
Evona Brim; Christopher B. Summerer;
Nancy Summerer; Edward L. Clare;
Hazel A. Clare; Patricia S. Cavens;
Norman Stoll; Mike Schaeffer;
Milton Wiederhold; Stephen C. Johnson;

Josefina M. Johnson; Oswald E. Jauch; Inge H. Jauch;
Brent H. Jauch;
Roger P. Jauch; Westland Investment Co.;
Benhardt Schmidt; Judith Schmidt;
John D. Medak; Edward T. Medak;
Lee J. Asch; Lee J. Asch, Jr.;
Jack C. Hilbourne; Irene Hilbourne;
Ronald Williamson; Mavis Williamson;
Steven P. Mozinski; Edward Zakocs, Jr.;
Harsch Investment Corp. and its
subsidiaries; P/E Walker Trust;
Sherry Bonney;
Appellants,

MULTNOMAH COUNTY;
the City of Portland;
The Portland Development Commission;
Wasco County; the City of The Dalles;
Columbia Gateway Urban Renewal Agency;
Clackamas County; Washington County;
the City of Tualatin;
Tualatin Development Commission,
Respondents,
and
MARION COUNTY;
the City of Salem;
Salem Urban Development Division;
the City of Oregon City and
Oregon City Urban Renewal Agency,
Respondents (below).
(OTC 3368; SC S41859)

In Banc
On appeal from the Oregon Tax Court.*
Carl N. Byers, Judge.
Argued and submitted September 7, 1995.
Roger Tilbury, Portland, argued the cause *in propria* persona and filed the briefs on behalf of appellants. With him on the briefwas Roch Steinbach, Portland. On the reply brief was Roger Tilbury.

Harry M. Auerbach, Portland, argued the cause on behalf of respondents City of Portland, Multnomah County, and the Portland Development Commission. With him on the brief
* 13 OTR 157 (1994).

were Kathryn Beaumont Imperati and Sandra N. Duffy, Portland. Joining in the brief were respondents City of Tualatin and Tualatin Development Commission.

Gene E. Parker, City Attorney, The Dalles, argued the cause on behalf of respondents City of The Dalles, Columbia Gateway Urban Renewal Agency, and Wasco County. With him on the brief was Bernard L. Smith, District Attorney for Wasco County, The Dalles.

DURHAM, J.

The judgment of the Tax Court is affirmed.

**DURHAM, J.**

In this proceeding before the Oregon Tax Court, plaintiffs, who reside in or own property in the cities of Portland, Salem, Oregon City, The Dalles, and Tualatin, sought refunds of urban renewal taxes collected by defendants[1] for tax year 1991-92. Plaintiffs contend that those taxes exceed the property tax limitation in Article XI, section 11b, of the Oregon Constitution.[2] *See City of Portland v. Smith*, 314 Or 178, 193, 838 P2d 568 (1992) (property taxes levied for repayment of urban renewal bonds are not exempt from the propertytax limitation in Article XI, section 1 lb(1)).

The Tax Court entered summary judgment for defendants. The court first ruled that the procedure described in ORS 305.583[3] was plaintiffs' exclusive remedy for the claim stated in the complaint. *See Smith v. Multnomah County Board of Commissioners*, 318 Or

[1] The Tax Court granted a partial summary judgment to defendant City of Salem, because no plaintiff established a right to a refund of any tax levied by that defendant. Plaintiffs do not challenge that ruling on appeal. As to defendant City of Salem, this appeal is moot. For the sake of simplicity, we refer to the remaining respondents on appeal as "defendants."

[2] Article XI, section 11b(1), of the Oregon Constitution imposes a limitation on the assessment of "property taxes." Subsection (3) of that section provides:

302, 309, 866 P2d 356 (1994) (procedure described in ORS 305.583 is the exclusive remedy for a claim of unlawful taxation under Article XI, section 11b, of the Oregon Constitution). The court then ruled that plaintiffs' complaint was untimely, because they did not file it within the 60-day filing period established by ORS 305.583(3). *Tilbury v. Multnomah County*, 13 OTR 157, 165 (1994).

Plaintiffs admit that the 60-day filing period established by the statute expired no later than December 25, 1991. They filed their petition on January 5, 1993. On appeal, plaintiffs argue that their complaint was filed in a timely manner, because the 60-day filing requirement in ORS 305.583(3) is either inapplicable or unconstitutional. They contend that: (1) the 60-day rule is not severable from the 10-taxpayer requirement in ORS 305.583(1) and that the latter requirement unconstitutionally denies due process under the Fourteenth Amendment to the Constitution of the United States; [4](2) the "Taxpayer Bill Of Rights," ORS 305.860(1)(c) and (2),6 and "the minimum dictates of due process" require personal notice of the manner in which plaintiffs may contest the disputed taxes, but they did not receive such notice; and (3) plaintiffs did not receive fair notice of the procedure described in ORS 305.583, which became effective on September 29, 1991, because public law libraries did

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"The limitations of subsection (1) of this section apply to all taxes imposed on property or property ownership except

"(a) Taxes imposed to pay the principal and interest on bonded indebtedness authorized by a specific provision of this Constitution.

"(b) Taxes imposed to pay the principal and interest on bonded indebtedness incurred or to be incurred for capital construction or improvements provided the bonds are offered as general obligations of the issuing governmental unit and provided further that either the bonds were issued not later than November 6, 1990, or the question of the issuance of the specific bonds has been approved by the electors of the issuing governmental unit."

[3] ORS 305.583 provides in part:

"(1) Ten or more interested taxpayers may petition the Oregon Tax Court to determine the effect of the limits of section 11b, Article XI of the Oregon Constitution on any tax, fee, charge or assessment imposed by a unit of government. For purposes of this section, 'interested taxpayers' means persons who are subject to the tax, fee, charge or assessment in question.

not receive the permanent volumes of the 1991 Oregon Revised Statutes until approximately 40 days of the 60-day filing period had expired.

We turn to the issue of the severability of the 60-day filing requirement in ORS 305.583(3). The Tax Court held that the 10-taxpayer requirement deprived individual taxpayers of their right to challenge a deprivation of property through exaction of a tax. *Tilbury*, 13 OTR at 164. Plaintiffs urge us to affirm that ruling, but we decline to address that question. Even if we assume, *arguendo*, that the Tax Court's due process ruling is correct, that says nothing about the severability of the 60-day filing requirement.

We pursue the intention of the legislature in deciding whether one part of a statute is severable from another unconstitutional part. ORS 174.040 guides our analysis of the question of severability:

"It shall be considered that it is the legislative intent, in the enactment of any statute, that if any part of the statute is held unconstitutional, the remaining parts shall remain in force unless:

"(1) The statute provides otherwise;

"(2) The remaining parts are so essentially and inseparably con-

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"(3) In the case of any tax, fee, charge or assessment for any purpose that s was imposed under an ordinance or resolution adopted by a local government unit before September 29, 1991, or in the case of any tax levied to pay principal or interest on bonded indebtedness approved by the governing body of a local government unit before September 29, 1991, the petition shall be filed within 60 days after the date the governing body of the local government unit adopts an ordinance or resolution classifying its taxes, fees, charges or assessments as subject to or not subject to the limits of section 11b, Article XI of the Oregon Constitution; or, if the governing body does not adopt a classifying ordinance or resolution, within 60 days after the later of:

"(a) The last date, but no later than November 15, that the tax statements were mailed for the tax year in which the tax, fee, charge or assessment was imposed; or

"(b) The date of imposition of the tax, fee, charge or assessment on any one of the petitioners that first occurs after September 29, 1991."

nected with and dependent upon the unconstitutional part that it is apparent that the remainingparts would not have been enacted without the unconstitutional part; or

"(3) The remaining parts, standing alone, are incomplete and incapable of being executed in accordance with the legislative intent."

None of the subsections of that statute applies here. Accordingly, even if the Tax Court's due process ruling is correct, the 60-day filing requirement is severable and, under ORS 174.040, "shall remain in force."

Neither can plaintiffs rely on the "Taxpayer Bill Of Rights," ORS 305.860 *et seq,* in attacking the adequacy ofthe tax notices that they received from defendants. Those statutes pertain to obligations of the Oregon Department of Revenue, not local government. The "Taxpayer Bill Of Rights" furnishes no basis for plaintiffs' attack on tax notices issued by local governments.

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[4] This court recently held in *Ester u. City of Monmouth,* 322 Or 1, 13, _ P2d _ (1995), that the 10-taxpayer requirement does not deny due process in the context of a taxpayer challenge to an assessment for a local improvement because, in that context, the taxpayer has a right to challenge the assessment "before the circuit court upon a writ of review pursuant to ORS 223.401." *Ester* did not decide whether the 10-taxpayer requirement denies due process in the context of this case, *i.e.,* where taxpayers challenge a tax levied for repayment of urban renewal bonds and the statute containing the 10-taxpayer requirements is the only route of redress.

[5] ORS 305.860 provides in part:

"(1) The director shall prepare a statement which sets forth in simple nontechnical terms:

"(c) The procedures for filing and processing refund claims and filing of taxpayer complaints; and

"(2) The statement prepared in accordance with subsection (1) of this section shall be distributed by the Director of the Department of Revenue to all taxpayers upon request. The director shall inform taxpayers of their rights in a brief explanatory statement included in all billing or collection notices, all notices of assessment or deficiency and all notices of refund adjustment or denial sent to the taxpayer."

Finally, we reject, without discussion, plaintiffs' contention regarding the timing of various law libraries' receipt of bound volumes of the Oregon Revised Statutes.

Plaintiffs' petition for refunds of urban renewal property taxes was filed too late. Accordingly, the Tax Court did not err in granting defendants' motions for summary judgment.

The judgment of the Tax Court is affirmed.

A.11

## IN THE OREGON TAX COURT

Roger TILBURY et al
v.
MULTNOMAH COUNTY;
the City of Portland;
the Portland Development Commission;
Wasco County; the City of The Dalles;
Columbia Gateway Urban Renewal Agency;
Marion County; the City of Salem;
Salem Urban Development Division;
Clackamas County; Clackamas County
Urban Renewal Agency;
Washington County; the City of Tualatin;
Tualatin Development Commission
(TC 3368)

Petitioners sought refunds of urban renewal property taxes collected in excess of the limits of Article XI, section 1 lb, of the Oregon Constitution. The court held that the ten-interested-taxpayer requirement of ORS 305.583(1) does not provide adequate due process protection for individual taxpayers. However, the 60-day filing period in ORS 305.583(3) is a valid requirement. Because petitioners failed to file within the time period, the court granted respondents' motion for summary judgment.

**Constitutional construction—Due process**

1. The fundamental requirement of due process is an opportunity to be heard at a meaningful time and in a meaningful manner.

**Constitutional construction—Due process**

2. The state may provide a hearing before or after the taxpayer is deprived of any property interest. However, if the hearing is not provided until after the deprivation, then the state must provide the taxpayers with a clear and certain remedy.

**Constitutional construction—Due process**

3. The statutory requirement of associating with nine other taxpayers may cause an individual taxpayer to lose the very rights guaranteed by the Due Process Clause. The requirement of ten interested taxpayers provides a group remedy, not an individual remedy- the risk of an erroneous deprivation is increased by the requirement of associating at least nine other interested taxpayers; and it is doubtful that any significant benefits will be realized by the government from requiring taxpayers to associate together in a single petition. Accordingly, a group remedy does not provide adequate process by which a taxpayer may protect his or her property from unconstitutional taxation.

**Constitutional construction—Due process**

4. Because ORS 305.583 provides the exclusive remedy for a taxpayer to contest an exaction which is illegal under section 11b of the Oregon Constitution, due process demands that it be available to an individual. Accordingly, the ten interested-taxpayer requirement is a condition which violates the Due Process Clause of the United States Constitution and is deemed void.

**Legislature—Effective date of legislation**

5. Legislation takes effect 90 days from the end of the session at which it was passed. The purpose of such delay is to allow the public an opportunity to learn of the law and to comply with it.

**Legislature—Effective date of legislation**

6. Once a law becomes effective, citizens are required to comply with it.

Oral argument was held September 8, 1994, in the courtroom of the Oregon Tax Court, Salem, Oregon.

Roger Tilbury and Roch Steinbach, Portland, represented plaintiffs -petitioners .

Sandra Duffy, Assistant County Counsel, Portland; Bernard L. Smith, Wasco County Counsel, The Dalles; David D. DeMartino,

City Attorney, Salem; Mark Pilliod, City Attorney, Tualatin; Gene E. Parker, City Attorney, The Dalles; Jeannette M. Launer, Legal Counsel, Portland; Harry M. Auerbach, Deputy City Attorney, Portland; Robert Cannon, Marion County Legal Counsel, Salem; Michael E. Judd, Clackamas County Counsel, Oregon City; and George D. McDowell, Assistant County Counsel, Hillsboro, represented defendants-respondents .

Decision for respondents rendered October 18, 1994.

**CARL N. BYERS, Judge.**

Petitioners seek refunds of 1991-92 urban renewal property taxes collected in excess of the limits of Article XI, section 11b, of the Oregon Constitution.[1] This appeal is brought under ORS 305.583, which is the exclusive remedy for taxpayers to obtain a determination of the effect of section 11b on any tax, fee, assessment or charge. *Smith v. Multnomah County Board of Commissioners,* 318 Or 302,865 P2d 356 (1994). The matter is before the court on cross motions for summary judgment.

Petitioners, who number in excess of 200, are residents of, or own taxable real property in, the respondent cities of Portland, Salem, Oregon City, The Dalles and Tualatin.

Respondent City of Salem has filed two supplemental motions for partial summary judgment. Those motions assert that petitioners Richard H. Fabrycki, Janice E. Fabrycki, and Dale Denson did not pay urban renewal taxes in Salem and, therefore, the City of Salem should be removed from this litigation. Petitioners concede the Fabryckis have no standing as to the City of Salem, but assert they are interested taxpayers as to Portland and Oregon City. Petitioner Dale Denson continues to maintain he owns property in the City of Salem. The court finds that Dale Denson's statements of interest fall short of establishing his right to a refund if granted. Therefore, respondent City of Salem's Motions for Partial Summary Judgment will be granted.

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[1] *City of Portland v. Smith,* 314 Or 178, 838 P2d 568 (1992), held that urban renewal bonded indebtedness was not specifically authorized by the Oregon Constitution (Article IX, section 1c) and, therefore, urban renewal taxes were not exempt from the limits of section 11b.

## SECTION 11b APPEALS

Article XI, section 11b, of the Oregon Constitution was added by an initiative adopted at the November 1990 general election. In response to that initiative, the legislature acted to implement and adapt the new limitation to the state's tax system. Part of the implementing legislation was ORS 305.580 through ORS 305.591. These provisions constitute the procedures for determining the effect of section 11b on taxes, fees, charges and assessments of units of government. One process allows units of local government to obtain a determination. ORS 305.589 and ORS 305.585. A separate process allows taxpayers to obtain a determination and refunds. ORS 305.583 and ORS 305.587. The legislature expressly provided that these processes are the "exclusive remedy" for determining the effect of section 11b.

## TAXPAYER APPEALS

ORS 305.583(1) provides:

> "Ten or more interested taxpayers may petition the Oregon Tax Court to determine the effect of the limits of section 11b, Article XI of the Oregon Constitution on any tax, fee, charge or assessment imposed by a unit of government. For purposes of this section, 'interested taxpayers' means persons who are subject to the tax, fee, charge or assessment in question."

ORS 305.583(2) specifies that the petition shall be filed in the Oregon Tax Court, naming the government unit that imposes the tax, fee, or charge as the respondent. It also specifies both the method for service and the contents of the petition.

ORS 305.583(3) imposes time limits for filing the petition:

> "In the case of any tax, fee, charge or assessment for any purpose that was imposed under an ordinance or resolution adopted by a local government unit before September 29, 1991, or in the case of any tax levied to pay principal or interest on bonded indebtedness approved by the governing body of a local government unit before September 29, 1991, the peti-

tion shall be filed within 60 days after the date the governing body of the local government unit adopts an ordinance or resolution classifying its taxes, fees, charges or assessments as subject to or not subject to the limits of section 11b, Article XI of the Oregon Constitution; or, if the governing body does not adopt a classifying ordinance or resolution, within 60 days after the later of:

"(a) The last date, but no later than November 15, that the tax statements were mailed for the tax year in which the tax, fee, charge or assessment was imposed; or

"The date of imposition of the tax, fee, charge or assessment on any one of the petitioners that first occurs after September 29, 1991."

Petitioners filed their petition on January 5, 1993. The petition seeks refunds for property taxes paid for the 1991-92 tax year. Petitioners admit that the 60-day period for filing the petition expired December 25, 1991, "at the latest." Consequently, petitioners must overcome this obstacle to maintain their appeal.

## REQUIREMENT OF "TEN" TAXPAYERS UNCONSTITUTIONAL

Petitioners attack the 60-day time limit on several grounds. First, they argue it is not severable from the requirement that the petition be filed by "ten interested taxpayers." ORS 305.683(1). Because this court held the "ten" requirement unconstitutional in *Welch v. Unified Sewerage Agency,* 12 OTR 359 (1992), petitioners reason that the 60-day filing period limitation must also be held unconstitutional. In opposition, respondents contend the court erred in *Welch* and ask the court to reconsider the issue.

In *Welch,* the court held that the "ten" requirement violated both Article I, section 10, of the Oregon Constitution, and the Due Process Clause of the United States Constitution. Subsequently, in *Ester v. City of Monmouth,* (No. 3528, Slip Op June 9, 1994), appeal pending, the court reversed itself with regard to Article I, section 10, of the Oregon Constitution. However, *Ester* affirmed that the requirement of ten interested taxpayers violated the Due Process Clause

of the Fourteenth Amendment. The court now reconsiders its decision in *Welch* and in *Ester.*

## DUE PROCESS REQUIRED

As stated in *McKesson v. Division of Alc. Bev.*, 496 US 18, 35-36, 110 S Ct 2238, 110 L Ed 2d 17 (1990):

> "Because exaction of a tax constitutes a deprivation of property, the State must provide procedural safeguards against unlawful exactions in order to satisfy the commands of the Due Process Clause."

1, 2. The fundamental requirement of due process is an opportunity to be heard at a meaningful time and in a meaningful manner. The state may provide a hearing before the taxpayer is deprived of any significant property interest but it is not required. *Cleveland Bd. of Educ. v. Loudermill,* 470 US 532, 542, 105 S Ct 1487, 84 L Ed 2d 494 (1985). A state may impose and collect a tax before the taxpayer is given an opportunity for a hearing. However, if the hearing is not provided until after the deprivation, then the state "must provide taxpayers with, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a 'clear and certain remedy.' " *McKesson,* 496 US at 38.

## ADEQUATE DUE PROCESS

The question here is not whether the process afforded by ORS 305.583 is predeprivation or postdeprivation, but whether it is adequate. In *Mathews v. Eldridge,* 424 US 319, 96 S Ct 893, 47 L Ed 2d 18 (1976), the United States Supreme Court set forth three factors which a court should consider in determining whether procedures are adequate under the Due Process Clause. Those factors were: (1) The private interest that will be affected, (2) the risk of an erroneous deprivation through the procedures used and the value of additional safeguards that might be employed, and (3) the government's interest, including the functions involved and fiscal or administrative burdens that any other procedures would entail. 424 US at 335.

Consideration of the *Mathews* factors helps illustrate the problem at hand. The private interest affected is the taking of property

through taxation. The statutory requirement that a taxpayer associate with nine other interested taxpayers in order to file a petition imposes a heavy burden upon the individual. The individual taxpayer must incur expense and delay in locating and recruiting other petitioners. To protect his own standing, he must investigate and determine that the nine others qualify as interested taxpayers. The burden is on the taxpayer to persuade others to engage in litigation. If a taxpayer is successful in associating nine others, they then must agree upon representation and the sharing of litigation expenses.

3. The statutory requirement of associating with nine other taxpayers may cause an individual taxpayer to lose the very rights guaranteed by the Due Process Clause. That is, the taxpayer may lose control of the case and not be able to introduce relevant evidence or be able to cross-examine witnesses. An individual taxpayer may be bound by the admissions or concessions of other taxpayers in the group. Further, an individual taxpayer's efforts may be hampered by disagreements, miscommunications or misunderstandings. In short, the requirement of ten interested taxpayers provides a group remedy, not an individual remedy.

The second factor, the risk of an erroneous deprivation, is increased by the requirement of associating with at least nine other interested taxpayers. As the petitioners in this case point out, the statute provides a relatively short time within which to file a petition. The time spent in locating and obtaining the cooperation of nine other interested taxpayers may cause an individual taxpayer to fail to comply with the time limitations. The risk of erroneous deprivation is also increased to the extent that litigation is discouraged. Litigation will be discouraged, not only by the delay, but by the possibility of increased expenses. An individual taxpayer may have to assume personal liability for the expenses of the litigation because others of the group do not have the resources or are unwilling to expend the resources.

In considering the third factor, the government's interest requiring ten or more interested taxpayers may reduce the number of petitions. The requirement may also reduce administrative costs. However, all petitions are filed in the same court. For purposes of judicial economy, the court could consolidate similar cases for hearing

and decision. Consequently, it is doubtful that any significant benefits will be realized from requiring taxpayers to associate together in a single petition. On the other hand, eliminating the requirement increases individual protection without materially increasing the burden on government.

In summary, consideration of the three factors set out in *Mathews* persuades the court that a group remedy does not provide adequate process by which a taxpayer may protect his or her property from unconstitutional taxation.

**DUE PROCESS IS AN INDIVIDUAL RIGHT**

4. The Fourteenth Amendment of the United States Constitution states:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law, * * *."

The term "person" suggests an individual, not a group. This court has found no holding of the United States Supreme Court interpreting this clause to indicate this is other than an individual right.

Respondents point out that similar appeal procedures requiring groups of taxpayers are found in Local Budget Laws (ORS 294.485) and timber valuation statutes (ORS 321.352(5)). The Local Budget Law requirement has not been challenged on constitutional grounds. The requirement in the timber valuation statute was challenged in Mt. *Sexton Properties v. Dept. of Rev.*, 10 OTR 467 (1987), *aff'd* 306 Or 465, 760 P2d 1320 (1988). However, as noted by both this court and the Oregon Supreme Court, that group remedy was not the exclusive remedy. The Supreme Court stated:

> "The dispute in the present case arises not out of the determination of individual rights through litigation, but instead arises as a challenge to an administrative rulemaking proceeding."
>
> "At that point, where plaintiffs as individuals have their rights finally established, the due process notice requirements increase, until, if litigation over plaintiffs' individual rights

occurs, plaintiffs would be entitled to the fullest due process notice." 306 Or at 479-80.

ORS 305.583 provides the exclusive remedy for a taxpayer to contest an exaction which is illegal under section 11b of the Oregon Constitution. Because it is the only remedy, due process demands that it be available to an individual. Accordingly, the court holds that the "ten" of ORS 305.583(1) is a condition which violates the Due Process Clause of the United States Constitution and must be deemed void.

## NOTICE OF NEW LAWS

Petitioners contend they were given inadequate notice of the 60-day time limit for filing the petition. [2] As indicated, section 11b was adopted at the general election held in November 1990. The following January, the legislature convened and began working on implementing legislation. The legislature adopted Or Laws 1991, ch 459, on June 30, 1991, and it became effective on September 29, 1991, 90 days after the adjournment of the legislature. The law was expressly made applicable to tax years beginning on and after July 1, 1991. Or Laws 1991, ch 459, § 452.

Petitioners argue that the 60 days expired before they had a reasonable opportunity to learn of the requirement.

5. Article IV, section 28, of the Oregon Constitution, provides that:

"No act shall take effect, until ninety days from the end of the session at which the same shall have been passed, * * *."

The purpose of such delay is to allow the public an opportunity to learn of the law and to comply with it.[3]

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[2] Petitioners also appear to believe that, because they accepted the statute at face value, they were not required to timely challenge its validity. (Plaintiff's Reply in Support of Motion for Summary Judgment: City of Portland at 3 and 5.) This is contrary to the fundamental principles by which laws are examined by the courts.

[3] The practice varies from state to state. In some states, laws become effective ???? been published and distributed. Sutherlin, 2 *Statutory Construct on, § 33.06.*

"If no other date beyond the 90-day constitutional provision is written into the act, then the constitutional provision governs to all intents and purposes as though expressly stated in the act itself." *Portland Pendleton Trans. Co. v. Heltzel, 197* Or 644, 654, 255 P2d 124 (1953).

6. Once a law becomes effective, citizens are required to comply with it. This implies an obligation to be aware of what laws are enacted.

It is undisputed that legislative proceedings are public and the 1991 Legislative Advance Sheets were published in July and August. The 60-day period did not begin until the tax statements were mailed on or about October 25, 1991.

**TAX STATEMENTS**

Petitioners claim the tax statements were inadequate notice that the urban renewal taxes were outside the limits of section 11b. Petitioners believe they were entitled to an express notice characterizing the tax and telling them what they must do to contest that characterization. The tax statements, as published, complied with the statutory requirements. It is noteworthy that petitioners did not file their petition until after the Oregon Supreme Court held that urban renewal taxes were subject to the limits of section 11b. *City of Portland v. Smith,* 314 Or 178, 838 P2d 568 (1992).

Petitioners make a number of other claims and arguments. Most of those arguments pertain to policies and are best addressed to the legislature itself. Determining that the 60-day filing period is a valid requirement and that petitioners failed to comply with that requirement is dispositive of this case. Now, therefore,

IT IS ORDERED that petitioners' Motion for Partial Summary Judgment is denied, and

IT IS FURTHER ORDERED that respondent City of Salem's Supplemental Motions for Partial Summary Judgment are granted, and

IT IS FURTHER ORDERED that respondents' Motions for Summary Judgment are granted.

Costs to neither party.

## UNITED STATES CONSTITUTION

## AMENDMENT XIV

**Section 1. Citizenship; privileges and immunities; due process; equal protection.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## OREGON CONSTITUTION

**Section 11. Tax limitation.** (1) Except as provided in subsection (3) of this section, no taxing unit, whether it be the state, any county, municipality, district or other body to which the Power to levy a tax has been delegated, shall in any year so exercise that power to raise a greater amount of revenue than its tax base as defined in subsection (2) of this section. The portion of any tax levied in excess of any limitation imposed by this section shall be void.

(2) The tax base of each taxing unit in a given year shall be one of the following:

(a) The amount obtained by adding six percent to the total amount of tax lawfully levied by the taxing unit, exclusive of amounts described in paragraphs (a) and (b) of subsection (3) of this section, in any one of the last three years in which such a tax was levied by the unit; or

(b) An amount approved as a new tax base by a majority of the legal voters of the taxing unit voting on the question submitted to them in a form specifying in dollars and cents the amount of the tax base in effect and the amount of the tax base submitted for approval. The new tax base, if approved, shall first apply to the levy for the fiscal year next following its approval.

(3) The limitation provided in subsection (1) of this section shall not apply to:

(a) That portion of any tax levied which is for the payment of bonded indebtedness or interest thereon.

(b) That portion of any tax levied which is specifically voted outside the limitation imposed by subsection (1) of this section by a majority of the legal voters of the taxing unit voting on the question.

(4) Notwithstanding the provisions of subsections (1) to (3) of this section, the following special rules shall apply during the periods indicated:

(a) During the fiscal year following the creation of a new taxing unit which includes property previously included in a similar taxing unit, the new taxing unit and the old taxing unit may not levy amounts on the portions of property received or retained greater than the amount obtained by adding six percent to the total amount of tax lawfully levied by the old taxing unit on the portion received or retained, exclusive of amounts described in paragraphs (a) and (b) of subsection (3) of this section, in any one of the last three years in which such a tax was levied.

(b) During the fiscal year following the annexation of additional property to an existing taxing unit, the tax base of the annexing unit established under subsection (2) of this section shall be increased by an amount equal to the equalized assessed valuation of the taxable property in the annexed territory for the fiscal year of annexation multiplied by the millage rate within the tax base of the annexing unit for the fiscal year of annexation, plus six percent of such amount.

(c) Whenever any taxing unit merges with one or more other taxing units without expanding its territory, in the first fiscal year of the merger, the tax base of the merged taxing unit shall be equal to the tax bases of all of the taxing units included in the merger for the prior fiscal year, plus six percent thereof.

(5) The Legislative Assembly may provide for the time and manner of calling and holding elections authorized under this section. However, the question of establishing a new tax base by a taxing unit other than the state shall be submitted at a regular statewide general or primary election. [Created through S.J.R. No. 33, 1961, adopted by people Nov. 6, 1962 (this section adopted in lieu of former section 11 of this Article), Amendment proposed by H.J.R. 28, 1985, and adopted by people May 20, 1986]

**Section 11a. School district tax levy.** (1) Notwithstanding section 11 of this Article, in any year, a school district may levy ad valorem property taxes for operating purposes in an amount that, together with other levies, is not in excess of the amount levied for operating purposes in the preceding year.

(2) A levy referred to in subsection (1) of this section shall not

be considered in determining the limitation imposed under section 11 of this Article.

(3) Notwithstanding subsection (5) of section 11 of this Article, the question of establishing a new tax base by a school district may be submitted only once annually on a date specified by the Legislative Assembly.

(4) The Legislative Assembly shall by law implement this section. Notwithstanding sections 1 and 28, Article IV and section 1a, Article IX of this Constitution, the initial legislation, chapter 16, Oregon Laws 1987 (Enrolled Senate Bill 278), shall take effect on the effective date of this section. [Created through S.J.R. 3, 1987, adopted by people May 19, 1987]

**Section 11b. Property tax categories; limitation on categories; exceptions.** (1) During and after the fiscal year 1991-92, taxes imposed upon any property shall be separated into two categories: One which dedicates revenues raised specifically to fund the public school system and one which dedicates revenues raised to fund government operations other than the public school system. The taxes in each category shall be limited as set forth in the table which follows and these limits shall apply whether the taxes imposed on property are calculated on the basis of the value of that property or on some other basis:

MAXIMUM ALLOWABLE TAXES
For Each $1000.00 of
Property's Real Market Value

| Fiscal Year | School System | Other than Schools |
|---|---|---|
| 1991-1992 | $15.00 | $10.00 |
| 1992-1993 | $12.50 | $10 00 |
| 1993-1994 | $10.00 | $10.00 |
| 1994-1995 | $ 7.50 | $10.00 |
| 1995-1996 and thereafter | $ 5.00 | $10.00 |

Property tax revenues are deemed to be dedicated to funding the public school system if the revenues are to be used exclusively for educational services, including support services, provided by some unit of government at any level from pre-kindergarten through post-graduate training.

(2) The following definitions shall apply to this section:

(a) "Real market value" is the minimum amount in cash which could reasonably be expected by an informed seller acting without compulsion, from an informed buyer acting without compulsion, in an "arms-length" transaction during the period for which the property is taxed.

(b) A "tax" is any charge imposed by a governmental unit upon property or upon a property owner as a direct consequence of ownership of that property except incurred charges and assessments for local improvements.

(c) "Incurred charges" include and are specifically limited to those charges by government which can be controlled or avoided by the property owner.

(i) because the charges are based on the quantity of the goods or services used and the owner has direct control over the quantity; or

(ii) because the goods or services are provided only on the specific request of the property owner; or

(iii) because the goods or services are provided by the governmental unit only after the individual property owner has failed to meet routine obligations of ownership and such action is deemed necessary to enforce regulations pertaining to health or safety.

Incurred charges shall not exceed the actual costs of providing the goods or services.

(d) A "local improvement" is a capital construction project undertaken by a governmental unit

(i) which provides a special benefit only to specific properties or rectifies a problem caused by specific properties, and

(ii) the costs of which are assessed against those properties in a single assessment upon the completion of the project, and

(iii) for which the payment of the assessment plus appropriate interest may be spread over a period of at least ten years.

The total of all assessments for a local improvement shall not exceed the actual costs incurred by the governmental unit in designing, constructing and financing the project.

(3) The limitations of subsection (1) of this section apply to all taxes imposed on property or property ownership except

(a) Taxes imposed to pay the principal and interest on bonded indebtedness authorized by a specific provision of this Constitution.

(b) Taxes imposed to pay the principal and interest on bonded indebtedness incurred or to be incurred for capital construction or improvements, provided the bonds are offered as general obligations of the issuing governmental unit and provided further that either the bonds were issued not later than November 6, 1990, or the question of the issuance of the specific bonds has been approved by the electors of the issuing governmental unit.

(4) In the event that taxes authorized by any provision of this Constitution to be imposed upon any property should exceed the limitation imposed on either category of taxing units defined in subsection (1) of this section, then, notwithstanding any other provision of this Constitution, the taxes imposed upon such property by the taxing units in that category shall be reduced evenly by the percentage necessary to meet the limitation for that category. The percentages used to reduce the taxes imposed shall be calculated separately for each category and may vary from property to property within the same taxing unit. The limitation imposed by this section shall not affect the tax base of a taxing unit.

(5) The Legislative Assembly shall replace from the State's general fund any revenue lost by the public school system because of the limitations of this section.

The Legislative Assembly is authorized, however, to adopt laws which would limit the total of such replacement revenue plus the

taxes imposed within the limitations of this section in any year to the corresponding total for the previous year plus 6 percent. This subsection applies only during fiscal years 1991-92 through 1995-96, inclusive. (Created through initiative petition filed May 8, 1990, adopted by people Nov. 6, 1990l

**Section 11c. Limits in addition to other limits.** The limits in section 11b of this Article are in addition to any limits imposed on individual taxing units by this Constitution. [Created through initiative petition filed May 8, 1990, adopted by people Nov. 6, 1990]

**Section 11d. Effect of section 11b on exemptions and assessments.** Nothing in sections 11b to 11e of this Article is intended to require or to prohibit the amendment of any current statute which partially or totally exempts certain classes of property or which prescribes special rules for assessing certain classes of property, unless such amendment is required or prohibited by the implementation of the limitations imposed by section 11b of this Article. [Created through initiative petition filed May 8, 1990, adopted by people Nov. 6, 1990l

**Section 11e. Severability of sections 11b, 11c and 11d.** If any portion, clause or phrase of sections 11b to 11e of this Article is for any reason held to be invalid or unconstitutional by a court of competent jurisdiction, the remaining portions, clauses and phrases shall not be affected but shall remain in full force and effect. [Created through initiative petition filed May 8, 1990, adopted by people Nov. 6, 1990]

**Section 11f. School district tax levy following merger.** (1) If a school district merges with one or more other school districts and the merger is first effective for a fiscal year beginning on or after January 1, 1991, the tax base of the school district shall be equal to the sum of the tax base amounts for each of the school districts included in the merger, as otherwise determined under subsection (2) of section 11 of this Article.

(2) Subsection (4) of section 11 of this Article does not apply to a school district. The Legislative Assembly shall enact legislation to carry out the provisions of this section, including the circumstances under which mergers occur. [Created through H.J.R. 14, 1989, adopted by people Nov. 6, 1990]

## OREGON REVISED STATUTES

174.040 **Severability.** It shall be considered that it is the legislative intent, in the enactment of any statute, that if any part of the statute is held unconstitutional, the remaining parts shall remain in force unless:

(1) The statute provides otherwise;

(2) The remaining parts are so essentially and inseparably connected with and dependent upon the unconstitutional part that it is apparent that the remaining parts would not have been enacted without the unconstitutional part; or

(3) The remaining parts, standing alone, are incomplete and incapable of being executed in accordance with the legislative intent.

## (CONSTITUTIONAL LIMIT UPON PROPERTY TAXES; EFFECTS; DETERMINATION)

**305.580 Effects of property tax limit; exclusive remedy for determinations; priority of petitions.** (1) The provisions of ORS 305.583, 305.585, 305.587 and 305.589 shall provide the exclusive remedy for determination of questions concerning the effect of the limits of section 11b, Article XI of the Oregon Constitution on taxes, fees, charges and assessments of units of government.

(2) A petition filed with the Oregon Tax Court pursuant to ORS 305.583, 305.585, 305.587 or 305.589 shall have priority over all other cases pending before the Oregon Tax Court and shall be heard and decided as soon after coming to issue as is reasonably possible. [1991 c.459 §25]

**305.583 Interested taxpayer petitions; manner and time for filing; notice of classification of tax, fee, charge or assessment as subject or not subject to limit.** (1) Ten or more interested taxpayers may petition the Oregon Tax Court to determine the effect of the limits of section 11b, Article XI of the Oregon Constitution on any tax, fee, charge or assessment imposed by a unit of government. For purposes of this section, interested taxpayers means persons who are subject to the tax, fee, charge or assessment in question.

(2) The petition shall be filed and perfected in the following manner only:

(a) The petitioners shall file an original and two certified copies of a petition with the clerk of the Oregon Tax Court at its principal office in Salem, Oregon. The petition shall name the government unit that imposes the tax, fee, charge or assessment, or, in the case of an urban renewal agency, that receives the taxes, as respondent. Such filing in the Oregon Tax Court shall constitute the perfection of the petition. If after withdrawal of any petitioner five or more petitioners remain, withdrawal of the petitioner after perfection of the petition shall not affect the court's jurisdiction to hear the case. The clerk of the tax court shall serve the government unit by mailing a certified copy of the petition to the recording officer or chief admin-

istrative officer of the local government unit or to the Attorney General if the tax, fee, charge or assessment in question is imposed by the State of Oregon. The clerk also shall serve a copy of any petition naming a local government unit as respondent upon the Oregon Department of Justice.

(b) The petition shall state the facts and grounds upon which the petitioners contend that the tax, fee, charge or assessment is affected by section 11b, Article XI of the Oregon Constitution. The case shall proceed thereafter in the manner provided for appeals from orders of the Department of Revenue concerning ad valorem property tax assessments. ORS 305.405 to 305.418 and 305.420 to 305.500 shall apply to such actions.

(3) In the case of any tax, fee, charge or assessment for any purpose that was imposed under an ordinance or resolution adopted by a local government unit before September 29 1991, or in the case of any tax levied to pay principal or interest on bonded indebtedness approved by the governing body of a local government unit before September 29, 1991, the petition shall be filed within 60 days after the date the governing body of the local government unit adopts an ordinance or resolution classifying its taxes, fees, charges or assessments as subject to or not subject to the limits of section 11b, Article XI of the Oregon Constitution; or, if the governing body does not adopt a classifying ordinance or resolution, within 60 days after the later of:

(a) The last date, but no later than November 15, that the tax statements were mailed for the tax year in which the tax, fee, charge or assessment was imposed; or

(b) The date of imposition of the tax, fee, charge or assessment on any one of the petitioners that first occurs after September 29, 1991.

(4) Except as provided in subsections (5) to (7) of this section, in the case of any tax, fee, charge or assessment that is imposed under a resolution or ordinance approved by the governing body of a local government unit on or after September 29, 1991, the petition

shall be filed within 60 days after the action of the governing body approving the ordinance or resolution, adopting a new ordinance or resolution or changing an existing ordinance or resolution under which the tax, fee, charge or assessment is imposed, if the resolution or ordinance includes a classification of the tax, fee, charge or assessment as subject to or not subject to section 11b, Article XI of the Oregon Constitution. If the local government unit has not classified the tax, fee, charge or assessment, the petition shall be filed within 60 days after the later of the dates specified in subsection (3)(a) or (b) of this section. If the local government unit adopts an ordinance or resolution classifying all or any of the taxes, fees, charges or assessments it imposes as subject to or not subject to section 11b, Article XI of the Oregon Constitution, as described in ORS 310.145, the petition shall be filed within 60 days after the governing body adopts the ordinance or resolution.

(5) In the case of any tax, fee, charge or assessment first imposed after September 29, 1991, that is characterized by the local government unit as an assessment for local improvements, the petition shall be filed within 60 days after the local government unit gives notice of its intention to characterize the charge as an assessment for local improvements. Notice may be given to affected property owners by the local government unit either when a local improvement district is formed, in a notice of intent to assess given by the local government unit or by other individual notice prior to assessment. Notice shall be given no later than the date the assessment is imposed. Notice given as provided under this subsection is in lieu of the notice required under subsection (8) of this section.

(6) In the case of any taxes levied to pay principal and interest on bonded indebtedness approved by the governing body of a local government unit on or after September 29, 1991, the petition shall be filed within 60 days after the date the issuance of the bonded indebtedness was approved by the governing body of the local government unit if the resolution or ordinance of the governing body authorizing issuance of the bonded indebtedness includes a classification of the bonded indebtedness as subject to or not subject to the limits of section 11b, Article XI of the Oregon Constitution. If the local government unit has not classified the bonded indebtedness,

the petition shall be filed within 60 days after the date specified in subsection (3)(a) of this section.

(7) In the case of a question concerning the effect of section 11b, Article XI of the Oregon Constitution on any tax, fee, charge or assessment imposed by the state, the petition shall be filed within 60 days after the first imposition of the tax, fee, charge or assessment by a state agency after September 29, 1991. For purposes of this subsection, a tax, fee, charge or assessment shall be considered imposed when it is due as provided by statute or when the state agency notifies a person that the tax, fee, charge or assessment is due.

"*****

(9) An ordinance or resolution that results in a mere change in the amount of a tax, fee, charge or assessment and does not result in a change in the characteristics or attributes of the tax, fee, charge or assessment, or contain a change in purpose to which the revenue is applied shall not be considered a change that may result in a proceeding commenced under subsection (3) or (4) of this section. [1991 c.459 §26,1993 c.18 §66; 1993 c.270 §19]

**305.587 Tax court findings; orders; refunds; other relief.** (1) If in a proceeding commenced under ORS 305.583, the tax court finds that a challenged tax, fee, charge or assessment is subject to the limits of section 11b, Article XI of the Oregon Constitution, the court may:

(a) Order the government unit to make refunds to petitioners of any part of the challenged tax, fee, charge or assessment imposed on or after the date that is 90 days before the date the petition was filed and that was collected in excess of the limits of section 11b, Article XI of the Oregon Constitution. The court may not order refunds if the government unit previously had obtained a judgment of the tax court or the Oregon Supreme Court under ORS 305.589, that the tax, fee, charge or assessment in question was not subject to the limits of section 11b, Article XI of the Oregon Constitution.

(b) Order such other relief as it considers appropriate, including cancellation of taxes imposed but not collected, but such relief shall have prospective effect only. In cases involving local government

units a copy of the court's order shall be served upon the assessor of the county or counties in which the local government unit is located at the same time the order is served upon the parties.

(2) If the court orders a unit of government to make refunds of any tax, fee, charge or assessment that was imposed and collected in excess of the limits of section 11b, Article XI of the Oregon Constitution, the government unit shall do so out of the resources of the government unit. No refund so ordered shall be paid from the unsegregated tax collections account. The assessor shall not be required to recompute the amount of tax due from any property or property owner with respect to the tax, fee, charge or assessment that is the subject of the order for any tax year for which a tax statement has been delivered under ORS 311.250.

(3) If, in a proceeding commenced under ORS 305.585, the court finds that a tax, fee, charge or assessment is not subject to the limits of section 11b, Article XI of the Oregon Constitution, the court may order such relief as it considers appropriate, but such relief shall have prospective effect only. In cases involving local government units, a copy of the court's order shall be served upon the assessor of the county or counties in which the local government unit is located at the same time the order is served upon the parties. The assessor shall not be required to recompute the amount of tax due from any property or property owner with respect to the tax, fee, charge or assessment that is the subject of the order for any tax year for which a tax statement has been delivered under ORS 311.250.

(4) For purposes of this section, taxes, fees, charges or assessments are deemed imposed when the statement or bill for the taxes, fees, charges or assessments is mailed. [1991 c.459 §26b; 1993 c.270 §20]

**310.143 Certification of taxes on taxable property subject to constitutional rate limits; refunds of taxes on property not certified or erroneously certified.** (1) Any tax on property that is imposed on property that is subject to ad valorem taxation by any unit of local government shall be certified to the assessor each year, as provided under ORS 310.060. Except as otherwise specifically provided by law, any tax, fee, charge or assessment that is not a tax on property or is not imposed on property subject to ad valorem taxation shall not be certified to the assessor. Each tax certified shall be certified in dollars and cents in either the total amount to be raised from all property in the unit, or in dollars and cents per property.

(2) If any unit of local government imposes on property that is subject to ad valorem taxation a tax on property, as defined in ORS 310.140, that is not certified to the assessor under ORS 310.060 for imposition and collection, and a court of competent jurisdiction determines that the tax is subject to the limits of section 11b, Article XI of the Oregon Constitution, the unit of local government shall pay any refunds ordered by the court. No refunds shall be paid from the unsegregated tax collections account, and the assessor shall not be required to redetermine the amount of other taxes imposed on any property that also is subject to the challenged tax.

(3) Notwithstanding ORS 311.806, when any unit of local government certifies a tax on property to be collected by the tax collector, and the amount of the tax on individual properties is calculated by the unit of local government, any claim for refund of such taxes due to an error in calculation of the amount of the tax shall be made to the unit of local government within the same time and in the same manner as claims for refund are to be made under ORS 311.806. The unit of local government shall pay any refunds it determines to be due to errors in calculation of the amount of the tax out of the funds available to the unit of local government. Such refunds shall not be paid from the unsegregated tax collections account, and the assessor shall not be required to redetermine the amount of other taxes imposed on the property for which the refund is made. [1991 c459 §211; 1993 c.270 §48]

## CORRECTING ERRORS OR OMISSIONS IN ROLLS

**311.205 Correcting errors or omissions in rolls.** (1) After the assessor certifies the assessment and tax roll to the tax collector, the officer in charge of the roll may correct errors or omissions in the roll to conform to the facts, as follows:

(a) The officer may correct a clerical error. A clerical error is an error on the roll which either arises from an error in the ad valorem tax records of the assessor, or the records of the Department of Revenue for property assessed under ORS 306.126, or which is a failure to correctly reflect the ad valorem tax records of the assessor, or the records of the Department of Revenue for property assessed under ORS 306.126, and which, had it been discovered by the assessor or the department prior to the certification of the assessment and tax roll of the year of assessment would have been corrected as a matter of course, and the information necessary to make the correction is contained in such records. Such errors include, but are not limited to, arithmetic and copying errors, and the omission or misstatement of a land, improvement or other property value on the roll.

(b) The officer may not correct an error in valuation judgment. Such errors are those where the assessor would arrive at a different opinion of value.

(c) The officer may correct any other error or omission of any kind, so long as it is not a change in valuation judgment. Such corrections include, but are not limited to, the elimination of an assessment to one taxpayer of property belonging to another on the assessment date, the correction of a tax limit calculation, the correction of a value changed on appeal, or the correction of an error in the real market value of property resulting from an error in the identification of a unit of property, but not an error in a notice filed under ORS 310.060.

**311.806 Refund of taxes on real and personal property.** (1) Subject to subsection (2) of this section, the county governing body shall refund, out of the refund reserve account provided in ORS 311.807, or the unsegregated tax collections account provided in ORS 311.385, taxes on property collected by an assessor or tax collector pursuant to a levy of the assessor or of any taxing district or tax levying body or pursuant to ORS 311.255, plus interest thereon as provided in ORS 311.812, in the following cases:

(a) To the owner or an owner of any taxable property or the person in whose name the property is assessed and in whose name a petition was filed, whenever a change in the value of property is ordered by a county board of equalization, county board of ratio review or the Department of Revenue and no appeal is taken or can be taken from the board's or department's order, or whenever ordered by the Oregon Tax Court or the Supreme Court and the order constitutes a final determination of the matter;

(b) Whenever a change in the value of property is made under ORS 309.115 upon resolution of an appeal and no separate appeal of the value of the property was taken for the year of the change:

(A) To the person in whose name the appeal was filed, for each year after the year for which the appeal was filed in which that person was listed as the owner or an owner or the person in whose name the property was assessed; and

(B) To the owner of record on the tax roll at the time of refund, each year thereafter;

(c) To the owner of record on the tax roll at the time of refund, whenever taxes are collected against real or personal property not within the jurisdiction of the tax levying body;

(d) Except as provided in ORS 310.143, to the owner of record on the tax roll at the time of refund, whenever, through excusable neglect, or through an error subject to correction under ORS 311.205 taxes on property are paid in excess of the amount legally chargeable thereon, and then only In the amount of money collected in excess of the amount actually due; or

(e) Except as provided in ORS 311.808, to the payer of the tax whenever any person pays taxes on the property of another by mistake of any kind.

(2)(a) Except as provided in paragraphs (b) and (c) of this subsection, no refund of taxes shall be allowed or made after six years from the assessment date for the fiscal year for which the taxes were collected.

## ABSTRACT OF RECORD

On the 7th day of January, 1993 Plaintiffs-Petitioners filed in the Oregon Tax Court a

## COMPLAINT OR TAXPAYER PETITION

which states the following claims in its amended form:

Paragraphs 1-5.

(listing the Plaintiffs by county)

Paragraphs 6-20.

(listing the defendants by county and municipality)

**Count I.**

21.

The assessment, levying and collection of said taxes by the Counties and their distribution to and receipt by the Cities and by PDC, OCURA, SUDD, TDC and CGURA, respectively, was and is an unconstitutional exercise of municipal authority by the Cities and those Urban Renewal Agencies. The Oregon Supreme Court in a recent decision, City of Portland v. Smith, 314 Or 178, 838 P2d 568 (September 3, 1992) has ruled that Counties were and are not authorized to collect said taxes, much less distribute them to defendant Cities and urban development commissions, since such taxation was in violation of the Oregon Constitution, Article XI, Section 11b, also known as Measure 5. As held by the Supreme Court, in affirming the Oregon Tax Court ruling at 12 OTR 208 (May 18, 1992), urban renewal taxes are "taxes" subject to Ballot Measure 5, and the Cities' urban renewal taxes in 1991-92 exceeded Ballot Measure 5 limits for non public-school bodies. The taxes collected by the Counties for the 1991 -92 tax year for Urban Renewal Bonds exceeded Ballot Measure 5 limits for non-school public bodies and were thus unconstitutional. The powers of the Counties are necessarily subordinate to the Constitution of Oregon.

22.

Despite demands by petitioners, defendants refuse to make the requested refunds mandated by ORS 311.806 through 311.821, relating to refunds, and has directed petitioners to this forum. Repayment of sums wrongfully collected is a ministerial act in view of the Opinion of this court and the Oregon Supreme Court. It is not a judgment call that Counties are free to ignore in their discretion.

23.

Plaintiffs are entitled to full and complete refund, reimbursement, repayment and recompensation of all monies paid to the Counties and Cities as taxes for urban renewal projects to be conducted through PDC, OCURA, SUDD, or CGURA, or through any other urban renewal project for which taxes were assessed for the fiscal year 1991-92. Said sums are wholly liquid and quantifiable, readily ascertained, and yet despite Supreme Court determination, and repeated requests, the Counties have refused to refund the excess and unconstitutional taxes. Pursuant to ORS 311.812(2)(c), interest on monies illegally raised should also be repaid, at the legal rate, from the date of wrongful collection by the Counties.

24.

Defendants have the funds to make refunds requested herein.

**Count 2.**

25.

(reallegations)

26.

On December 29, 1992, the Oregon Tax Court ruled that portions of the filing requirements of ORS 305.583(1) were unconstitutional under both the Federal and State Constitutions. See Welch v. Unified Sewerage Agency, 12 OTR 359, 364 (1992). The court stated:

> The [ten petitioners] requirement diminishes individual rights significantly, possibly depriving some taxpayers of any

remedy. For various reasons, some property owners may be unable to find nine others willing to associate in a petition under ORS 305.583 * * *

ORS 305.583 does not provide a meaningful opportunity or manner in which an individual may protect his or her property rights under Section 1 lb. Welch v. Unified Sewerage Agency, 12 OTR 359, 364 (1992).

27.

The filing requirements of ORS 305.583(1) through (8) are the only provisions available to individuals such as petitioners herein who seek to challenge local taxes through the "exclusive remedy" of ORS 305.583. Petitioners could not and cannot make up other filing standards, no matter how sensible or reasonable, that would substitute for "exclusive" procedures enacted by the Legislature. Cf. Smith v. Multnomah County, SC S40152 (January 20, 1994).

28.

The invalidated, restrictive and "exclusive" unconstitutional "ten petitioners" standard of ORS 305.583(1) leaves plaintiffs-petitioners wholly without authorized access to courts or remedy.

29.

The "exclusive remedy" for determinations of the effect of the constitution on local government taxes, declared by ORS 305.580 to lie, in the case of individual petitioners, in ORS 305.583, is thus in violation of due process standards of Ore. Const., Art.I, Sections 18 and 33, and of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Plaintiffs are entitled to refund of the monies unconstitutionally taxed, under common law, federal law, or the general refund statute ORS 311.806, or any other law or principle of equity.

**Count 3.**

30.

(reallegations)

31.

The tax statements at issue were mailed on or about October 25, 1991. At the time the petitioners' 60-day limitations period was running on their right to challenge the various defendants' urban renewal bond taxes under ORS 305.583, the unconstitutional "ten petitioners" requirement invalidated in Welch v. Unified Sewerage Agency, 12 OTR 359 (December 29, 1992) was in effect.

32.

> The [ten petitioners] requirement diminishes individual rights significantly, possibly depriving some taxpayers of any remedy. For various reasons, some property owners may be unable to find nine others willing to associate in a petition under ORS 305.583 * * *

ORS 305.583 does not provide a meaningful opportunity or manner in which an individual may protect his or her property rights under Section 1 lb. Welch v. Unified Sewerage Agency, 12 OTR 359, 364 (1992).

33.

Invalidated provisions of ORS 305.583(1) are integrated into the provisions for notice and filing of **timely** petitions under ORS 305.583(3)(a) and (b), (4) and (6), in that the latter paragraphs require "ten petitioners" to compute the deadline for filing of 305.583(1) petitions: i.e., 60 days from the earliest date on which any one of their "ten" membership received his tax statement in the mails. ORS 305.583(3)(b).

34.

Timely filing is further rendered impracticable because the limitations provisions of ORS 305.583(3) through (8) are too arcane and obscure to notify a filing party what is required of him.

35.

No other provisions of ORS 305.583 govern the calculation of the running of the statute of limitations for purposes of filing timely

individual petitions thereunder. ORS 305.583 has been determined to be the "exclusive remedy" for individuals seeking to challenge the constitutionality of acts such as those of defendants herein, and the exclusive procedure for claiming refunds.

36.

The invalidated "ten" requirement of ORS 305.583(1) is incorporated into the filing provisions of ORS 305.583(3)(b) and thus into ORS 305.583(4) and (6) as well, and is not severable from the exclusive filing provisions of the same statutes. Plaintiffs-petitioners were not at liberty to draft their own idea of what might be an acceptable 305.583(1) petition, or of what might constitute a timely filing.

37.

The statutory provisions of ORS 305.583(3)(4) and (6) for filing of **timely petitions** are thus invalidated by the Tax Court decision in Welch. Since no other statutory time-limitations apply to individuals under the "exclusive remedy" of ORS 305.583, petitioners herein cannot be denied their right to refunds, either under the common law, federal law or under ORS 311.806 or any other law, of monies unconstitutionally collected.

**Count 4.**

38.

(reallegations)

39.

Defendant Counties aver they mailed all 1991 tax statements to petitioners herein, on or before October 25, 1991. Defendant City of Portland's urban renewal bond taxes were designated on each of these notices as "Excluded from Limitation". See, e.g., Exhibit A.

40.

These tax statements contained no mention of the statutory right to "petition to challenge the constitutionality" of the said bond as-

sessments. ORS 305.583(1). Nor did they mention that the limitations period for filing such petitions was merely 60 days following receipt of the tax statements. ORS 305.583(3)(b). There was no mention that "ten" interested taxpayers were at that time required by law to join together in each petition. ORS 305.583(1). There was no indication that the determination that urban renewal bond taxes were "excluded" was only a local, and a self-serving determination: potentially binding, but without authority. See Exhibit "A". The scheme in question does not require that the tax statements include any such declarations or appeal information.

41.

The form of notice authorized by ORS 305.583 -- and used by defendant Counties in this instance -- fails to require that the County or "local government unit" provide actual or meaningful notice of the many rigorous and burdensome limits set on potential appeals thereby. But:

> * * * the law directing the proceeding must provide for some kind of notice and offer an owner an opportunity to be heard, or the proceeding will want the essential ingredients of due process of law. Plymouth Coal Co. v. Commonwealth of Pennsylvania, 232 U.S. 531, 536, 34 S. Ct. 359, 58 L. Ed. 713, 715 (1913).

42.

Defendant Counties did not provide such information at any time, and no other form of notice was provided to petitioners.

43.

The form of notice authorized for use by defendant Counties in this instance is unconstitutional under Ore. Const., Art.I, Secs. 18 and 33, and the Due Process Clause of the Fourteenth Amendment of the United States Constitution for failing to provide actual or meaningful notice of the nature of the taking, and failing to provide reasonable information about the unique, treacherous requirements for filing challenges to such assessments.

44.

The form of notice is further unconstitutional because the limitations provisions of ORS 305.583(3) through (8) are too arcane and obscure to notify a filing party what is required of him.

**Count 5.**

45.

(reallegations)

46.

Defendant Multnomah County avers it mailed all 1991 tax statements to petitioners herein, on or before October 25, 1991. Other defendant Counties mailed their tax statements at about that same time. Defendant City of Portland's urban renewal bond taxes were designated on each of these notices as "Excluded from Limitation". See, e.g., Exhibit A.

47.

These tax statements contained no mention of the statutory right to "petition to challenge the constitutionality" of the said bond assessments. ORS 305.583(1). Nor did they mention that the limitations period for filing such petitions was merely 60 days --perhaps less -- following receipt of the tax statements. ORS 305.583(3)(a), (b).

48.

The effective date of ORS 305.580 et seq. was Sept. 29, 1991.

49.

At the time these tax statements were mailed, the codification of the acts of the 1991 legislative session was underway but incomplete. The final bound volumes of the 1991 Oregon Revised Statutes were published and distributed in late January, 1991. Since defendant Counties mailed their notices on or about October 25, 1990, publication of the statute occurred after the expiration of the 60 day

statute of limitations created by ORS 305.583(3).

50.

For the 1991 year in question here, neither petitioners nor any citizens of any county in the state received adequate, reasonable or fair notice of the "expedited procedures" for petition-challenges established by ORS 305.580 et seq.; and indeed they received no notice whatever of those novel procedures.

51.

ORS 305.580 as applied to 305.583 is "the exclusive remedy" for challenging taxes designated outside Measure 5 limits. Smith v. Multnomah County, SC S40152 (January 20, 1994).

52.

**Since no notice** of this "exclusive remedy" was provided prior to the expiration of the limitations period on that same "exclusive remedy", denial of refunds based thereon offends the most basic sense of justice, is in violation of the fundamental right to a hearing, and violates the standards of due process of Ore. Const., Art.I, Sections 18 and 33, and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

**Count 6.**

53 through 58.

(Violation of Due Process Claims to allow notice by publication instead of service)

**Count 7.**

59 through 66.

(Unlawful delegation of legislative power to municipalities)

**Count 8.**

67 through 77.

(ORS 305.583(3) through (9) are unintelligible)

**Count 9.**

75 though 78.

(post-assessment appeal period is too short for due process to obtain)

**Count 10.**

79 through 82.

(Lack of due process for want of pre-deprivation hearing)

**Count 11.**

83 through 86.

(Inadequate provision for refund of invalidated taxes)

**PETITION FOR CLASS CERTIFICATION**

87 through 94.

(Alleges grounds for class status)

PRAYER

(Refund 1991-92 taxes collected outside of Ore. Const. Art. XI, Sec. 1 lb; prejudgment interest; attorneys fees; other appropriate relief)

On the 4th day of February, 1993 Defendants Multnomah County, City of Portland and Portland Development Commission filed their

ANSWER

in which they alleged:

1.

(admits some of the plaintiffs paid taxes for 1991-92 tax year to these defendants but denies on information and belief that the

other plaintiffs paid those taxes)

Defendants/respondents admit that Multnomah County is a political subdivision of the State of Oregon, and that Multnomah County assessed and collected taxes on real property in Multnomah County for tax year 1991, including the urban renewal rate certified to it by the City of Portland under ORS 457.440.

Defendants/respondents admit that the City of Portland is a municipal corporation existing and duly incorporated and organized under the laws of the State of Oregon and that the City of Portland activated, as its urban renewal agency, defendant/ respondent Portland Development Commission. For tax year 1991, the Commission determined and certified the amount of funds to be raised in accordance with ORS 457.440(2). Under ORS 457.440(3) the City of Portland limited the amount to be raised for urban renewal and certified that limited amount to defendant/respondent Multnomah County. Defendant/respondent Multnomah County assessed and collected taxes on real property in Multnomah County, including the urban renewal rate in accordance with ORS 457.440. No urban renewal funds were certified, and no urban renewal rate was assessed, for tax year 1992.

4.

Defendants/Respondents admit that the Portland Development Commission is the urban renewal and redevelopment agency of the City of Portland, pursuant to ORS chapter 457, that the Commission was created by adoption of Chapter 15 of the Charter of the City of Portland, and that the Commission is authorized to receive, and in fact has received, tax increment revenues in accordance with ORS chapter 457. For tax year 1991, the Commission received assessed tax revenues for the purpose of paying principal and interest on bonded indebtedness for redevelopment and urban renewal projects. As described in paragraph 3 of this Answer, the taxes for urban renewal were determined and assessed against taxable property in accordance with ORS 457.440.

5.

In City of Portland v. Smith, 314 Or 178, 193, 838 P2d 568 (1992), the Oregon Supreme Court held only "that Article IX, section 1c, of the Oregon Constitution is not a specific provision authorizing bonded indebtedness and therefore does not qualify for the exemption stated in Article XI, section 1 lb(3)(a), of the Oregon Constitution." Defendants/respondents had the legal authority to assess, levy and collect taxes for urban renewal, except that the taxes imposed upon any property for government operations other than the public school system could not exceed, in the aggregate, $10.00 for each $1,000.00 of that property's real market value.

6.

Defendants/respondents admit that some plaintiffs/petitioners have made demand to Multnomah County for refunds of the amounts assessed and paid for the urban renewal rate, that those plaintiffs/petitioners have claimed as authority for said demands the provisions of ORS 311.806 to 311.821, and that Multnomah County has informed those plaintiffs/petitioners that their exclusive remedy is provided by ORS 305.583.

7.

Defendants/respondents deny that plaintiffs/petitioners are entitled to any refund or reimbursement of any property taxes paid for tax year 1991.

8.

Defendants/respondents deny that Multnomah County has the funds to make the refunds requested in this proceeding.

9-10.

(deny all other allegations of the Plaintiff's Third Amended Complaint)

FIRST AFFIRMATIVE DEFENSE

11.

Plaintiffs/petitioners seek a determination of questions concerning the effect of the limits of section 11 b, Article XI of the Oregon Constitution on taxes and assessments of units of government.

12.

The provisions of ORS 305.583, 305.585, 305.587 and 305.589 provide the exclusive remedy for determination of the questions plaintiffs/petitioners raise.

13.

Under ORS 305.583(3), plaintiffs/petitioners were required to commence this action, if at all, within 60 days after the earlier of November 15, 1991, or the last date that tax statements for tax year 1991 were mailed.

14.

The Multnomah County Tax Assessor mailed tax statements to each plaintiff/petitioner for tax year 1991, including the assessments challenged in this action, not later than October 25, 1991.

15.

This action was not commenced within the time limited by statute.

SECOND AFFIRMATIVE DEFENSE

16-18.

(class action not authorized in Tax Court)

THIRD AFFIRMATIVE DEFENSE

(Multnomah County Only)

19.

Defendant/respondent Multnomah County realleges paragraphs 2, 3, 4, 11 and 12 of this Answer.

20.

Defendant/respondent Multnomah County did not impose the taxes which plaintiffs/petitioners challenge in this action.

21.

Under ORS 305.587(2), this court may not require Multnomah County to refund the taxes imposed by other units of government.

FOURTH AFFIRMATIVE DEFENSE

(City of Portland and PDC Only)

22.

Plaintiffs/petitioners' Third Amended Complaint/Claim fails to state a claim upon which relief may be granted against the City of Portland or the Portland Development Commission, because the statute upon which plaintiffs/petitioners rely, ORS 311.806 to 311.821 do not provide for payment of any refunds by these units of government.

PRAYER

(dismiss action)

On the 1st day of June, 1994 the Plaintiffs/Petitioners filed their

**MOTION FOR SUMMARY JUDGMENT**

in which they moved:

Come now plaintiffs-petitioners and pursuant to TCR 47A move the Court for summary judgment on each of their second through eleventh counts (Counts 2-11) on various theories of the constitutional invalidity of ORS 305.580 and ORS 305.583, as plead in their revised Sixth Amended Complaint and set forth seriatim below. Petitioners move the court to declare that the entire statutory scheme -- ORS 305.580 and 305.583 -- as it applies to individuals seeking relief from an unconstitutional or potentially unconstitutional tax, is invalid.

Petitioners contend that ORS 305.583 is unconstitutional, either under the federal or state constitutions, or both, although—and insofar as—these same statutes were declared by the Oregon Supreme Court in Smith v. Multnomah County, 318 Or. 302 (1994) to be the "exclusive remedy" available to parties like plaintiffs who might seek refund of taxes thought to be invalid under Measure 5.

In the alternative, Petitioners ask the court for a determination that as a matter of fact, the application and enforcement of ORS 305.583 against Petitioners herein, and/or to any taxpayers in the 1991-92 tax year, is unconstitutional.

On the 1st day of June, 1994, in support of their Motion for Summary Judgment, Plaintiffs-Petitioners filed the

**MOTION FOR SUMMARY JUDGMENT**

in which they moved:

Pursuant to TCR 47B, defendants-respondents City of Portland, Portland Development Commission, Multnomah County and Marion County move for summary judgment dismissing plaintiffs-petitioners' claims against them with prejudice. This motion is made on the ground that plaintiff's-petitioners have no claim under ORS 311.806 because their exclusive remedy is under ORS 305.583, and that, because they did not bring their claims within the time limited by ORS 305.583, the action is barred.

This motion is supported by the Memorandum in Support of City of Portland, Portland Development Commission, Multnomah County and Marion County's Motion for Summary Judgment and in Opposition to plaintiffs' Motion for Partial Summary Judgment, served and filed herewith.

* * *

On the 27th day of June, 1994 Defendants City of the Dalles, Columbia Gateway Urban Renewal Agency, and Wasco County filed their

**MOTION FOR SUMMARY JUDGMENT**

in which they moved:

COMES NOW the Defendants City of The Dalles and Columbia Gateway Urban Renewal Agency, by and through Gene E. Parker, City Attorney, and Wasco County, by and through Bernard L. Smith, Wasco County District Attorney, and move the Court for an Order granting the named Defendants Summary Judgment, pursuant to OTR 47, for the reason that there is no genuine issue as to any material fact, and the Defendants are entitled to judgment as a matter of law. In support of this Motion, Defendants rely upon the Memorandum of Points and Authorities filed herewith.

* * *

On the 15th day of July, 1994, Defendants City of Tualatin and Tualatin Development Commission filed their

**MOTION FOR SUMMARY JUDGMENT**

in which they moved:

COMES NOW the City of Tualatin and Tualatin Development Commission, by through Mark Pilliod, City Attorney, and moves the Court for an Order granting the named Defendants Summary Judgment, pursuant to OTR 47, for the reason that there is no genuine issue as to any material fact, and the Defendants are entitled to judgment as a matter of law. In support of this Motion, Defendants rely upon the Memorandum of Points and Authorities filed herewith.

* * *